

THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

Mailed: May 18, 2023

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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Agile Sports Technologies, Inc.
v.
Lashion Robinson
—

Opposition No. 91265207
—

Mary Ann Novak of Hilgers Graben PLLC,
for Agile Sports Technologies, Inc.

Moshe D. Lapin of Lapin Law Firm,
for Lashion Robinson.

—
Before Cataldo, English, and Allard,
Administrative Trademark Judges.

Opinion by Allard, Administrative Trademark Judge:

Lashion Robinson (“Applicant”) seeks registration on the Principal Register of the mark HUDL (in standard characters) for “Downloadable music files,” in International Class 9; “Music production services,” in International Class 41; and “Online social networking services; licensing services, namely, licensing of music and the provision

of information, advice and consultancy relating to the licensing of music,” in International Class 45.¹

Agile Sports Technologies, Inc. (“Opposer”) opposes registration of Applicant’s mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d),² on the ground that Applicant’s mark is likely to be confused with Opposer’s previously registered HUDL and HUDL-formative marks, the bulk of which contain a limitation limiting use “to athletic and sports performances or teams” or the like, the following of which is representative:

- HUDL (in standard characters) for “Computer hardware and computer software programs for the integration of text, audio, graphics, still images and moving pictures into an interactive delivery for multimedia applications **for use by athletic teams and athletic departments in preparation for athletic competitions,**” in International Class 9.³

However, Opposer also pleaded the following registered marks, the identifications for which do not contain any limitation related to sports or athletics:

¹ Application Serial No. 88697089 was filed on November 18, 2019, under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), based upon Applicant’s allegation of a bona fide intention to use the mark in commerce.

² The original notice of opposition also included a claim of dilution (1 TTABVUE 10-11), but Opposer later moved to amend its notice of opposition to remove this claim (15 TTABVUE). The Board granted Opposer’s motion. Order dated April 26, 2022 (19 TTABVUE) (“[T]he dilution claim is now withdrawn and waived.”).

Citations to the opposition proceeding record refer to TTABVUE, the Board’s online docketing system. Before the TTABVUE designation is the docket entry number, and any numbers following TTABVUE refer to the page(s) of the docket entry where the cited materials appear.

³ Reg. No. 3642808 and issued on June 23, 2009; renewed (emphasis added).

- HUDL (in standard characters) and  **hudl** both registered for, *inter alia*, “providing access to information, audio, and video via websites,” in International Class 38.⁴

In his answer, Applicant denied the salient allegations of the notice of opposition and asserted several purported affirmative defenses, none of which were true affirmative defenses.⁵

The case is fully briefed. Opposer bears the burden of proving its Section 2(d) claim by a preponderance of the evidence. *See Jansen Enters., Inc. v. Rind*, 85 USPQ2d 1104, 1107 (TTAB 2007). Having considered the evidentiary record, the parties’ arguments and applicable authorities, we find that Opposer has carried this burden. For the reasons discussed more fully below, we sustain the opposition.

⁴ The HUDL mark in standard characters (Reg. No. 5394399) (the ‘399 registration) registered on February 6, 2018.

The HUDL and Design mark (Reg. No. 5394400) also issued on February 6, 2018. The registration describes the mark as “[consisting] of three figures forming a circle. Each figure is comprised of a circle in the middle of a curve. The word ‘hudl’ appears to the right.” Color is not claimed as a feature of the mark.

⁵ Answer (4 TTABVUE 5). Applicant alleged that the term HUDL in Opposer’s marks is merely descriptive, has not acquired distinctiveness, and is thus not inherently distinctive. This is not a true affirmative defense but rather an impermissible collateral attack on Opposer’s registrations and can only be raised by counterclaim. Trademark Rule 2.106(b)(2)(ii); *Edom Labs., Inc. v. Lichter*, 102 USPQ2d 1546, 1549 n.6 (TTAB 2012) (“[A]s applicant has not filed a counterclaim to cancel opposer’s registration, any attempt by applicant to attack the validity of opposer’s registration, such as by contending that the mark is merely descriptive, constitutes an impermissible collateral attack on the validity of the registration and has not been considered.”).

Applicant also alleged that Opposer’s HUDL mark is not famous, that the term is weak, and that the goods and services covered by Opposer’s registered marks are unrelated to those identified in Applicant’s involved application, but we construe these as mere amplifications of Applicant’s denial of the claim of likelihood of confusion.

I. Evidentiary Matters

Opposer objects to certain evidence made of record by Applicant under its notices of reliance.⁶ First, Opposer objects to Applicant's reliance on this Board's decision in some prior consolidated opposition proceedings involving Opposer and an unrelated defendant: *Agile Sports Tech., Inc. v. Hudl Brewing Company LLC* (Consolidated Opposition Nos. 91247770, 91248316, 91248342) (TTAB 2021) (nonprecedential) ("Prior Proceedings"), wherein the oppositions were dismissed.⁷ Opposer argues that the decision in the Prior Proceedings constitutes hearsay, and that it is irrelevant to the extent the marks at issue in the Prior Proceedings and the evidence of record differ from that in the present proceeding.⁸ We overrule Opposer's objections. Documents from prior Trademark Trial and Appeal Board proceedings are "official records" under Trademark Rule 2.122(e)(1), 37 C.F.R. § 2.122(e)(1), and properly made of record under a notice of reliance. *Hard Rock Café Int'l (USA), Inc. v. Elsea*, 56 USPQ2d 1504, 1508 (TTAB 2000) (copy of Board's decision on summary judgment in prior opposition properly made of record under a notice of reliance). We will consider the decision in the Prior Proceedings for whatever probative value it may have.

Second, Opposer objects to Exhibits 6-31 and Exhibits 32-39 of Applicant's notices of reliance as hearsay and for "relevance to the extent that Applicant seeks to use the

⁶ Appendix A to Opposer's Evidentiary Objections (27 TTABVUE 50-53).

⁷ Exhibit 1 to Applicant's First Notice of Reliance (21 TTABVUE).

⁸ Opposer's Evidentiary Objections, p. 1 (27 TTABVUE 51).

exhibits or statements contained within them for other than the limited purposes permitted.”⁹ These exhibits consist of third-party trademark registrations and a pending application for HUDL and HUDDLE marks, and formatives thereof.¹⁰ We overrule the objections. Third-party registrations and applications are properly made of record under a notice of registration, *Burns Philip Food, Inc. v. Modern Prods. Inc.*, 24 USPQ2d 1157, 1159 n.3 (TTAB 1992) (third-party registrations admissible), *aff’d*, 1 F.3d 1252, 28 USPQ2d 1687 (Fed. Cir. 1993), and, as discussed in more detail herein, third-party registrations are probative of the inherent strength of Opposer’s mark.

However, to the extent that certain registrations have been cancelled (Exhibits 19, 28-31, and 33-35), they are admissible but have no probative value. *Kemi Organics, LLC v. Gupta*, 126 USPQ2d 1601, 1606 (TTAB 2018). Similarly, the pending application (Exhibit 39) is admissible but is evidence only of the fact that the application was filed on a certain date. *Nike Inc. v. WNBA Enters. LLC*, 85 USPQ2d 1187, 1193 n.8 (TTAB 2007) (“[P]ending applications are not evidence of anything except that the applications were filed on a certain date.”). In sum, we overrule Opposer’s objections and will consider the valid and subsisting third-party registrations for whatever probative value they may have in assessing the possible weakness of Opposer’s HUDL marks.

⁹ *Id.* at pp. 1-2 (27 TTABVUE 51-52).

¹⁰ Exhibits 6-31 and Exhibits 32-39 to Applicant’s Second and Third Notices of Reliance (23, 24 TTABVUE).

Third, Opposer objects to Exhibits 41-53 of Applicant's notice of reliance as hearsay.¹¹ With one exception (Exhibit 48), these exhibits consist of printouts of third-party websites that purport to show use of HUDDLE and HUDDLE-formative marks. Opposer's hearsay objection is moot because we consider Internet materials only for what they show on their face, not for the truth of the matter stated in them, "whether there is an objection or not." *WeaponX Performance Prods. Ltd. v. Weapon X Motorsports, Inc.*, 126 USPQ2d 1034, 1040 n.18 (TTAB 2018). Opposer also objects to these exhibits on the bases of relevance,¹² but we overrule Opposer's objection on this ground and will consider these third-party uses for whatever probative value they may have in assessing the potential weakness of Opposer's mark.

Opposer also objects to Exhibit 48 from Applicant's notice of reliance, which is a screen shot of the dictionary definition of the term "huddle" from the MERRIAM-WEBSTER DICTIONARY, asserting "[it] is not the type of definition or evidence of which the Board may take judicial notice."¹³ Opposer's objection is confusing because Applicant did not ask the Board to take judicial notice of the definition. Although not raised by Opposer, we note that the exhibit consists of a screen shot of the dictionary definition and, as such, does not bear the URL and date of capture, which is required for Internet evidence under a notice of reliance. *Safer, Inc. v. OMS Invs., Inc.*, 94 USPQ2d 1031, 1040 (TTAB 2010). Nonetheless, we overrule Opposer's objection

¹¹ Exhibits 41-53 to Applicant's Fifth Notice of Reliance (25 TTABVUE).

¹² Opposer's Evidentiary Objections, p. 2 (27 TTABVUE 52).

¹³ *Id.* (27 TTABVUE 52).

because a dictionary definition is the type of evidence of which the Board may take judicial notice. *In re Cordua Rests. LP*, 110 USPQ2d 1227, 1229 n.4 (TTAB 2014), *aff'd*, 823 F.3d 594, 118 USPQ2d 1632 (Fed. Cir. 2016) (The Board may take judicial notice of dictionary definitions, including online dictionaries that exist in printed format.).

II. The Record

The record consists of the pleadings,¹⁴ and, by operation of Trademark Rule 2.122(b), 37 C.F.R. § 2.122(b), Applicant's application file.

In addition, Opposer introduced the following testimony and evidence:

- Opposer's First Notice of Reliance on Applicant's responses to certain discovery requests;¹⁵
- Opposer's Second Notice of Reliance on printouts from third-party websites;¹⁶
- Opposer's Third Notice of Reliance on third-party trademark registrations;¹⁷

¹⁴ The original notice of opposition remains Opposer's operative pleading, except that the dilution claim is now withdrawn and waived. Board Order dated April 26, 2022 (19 TTABVUE).

¹⁵ Exhibits 53-54 (7 TTABVUE). Applicant's responses to Opposer's First Set of Requests for Admission include both admissions and denials. We consider only Applicant's admissions, as denials to requests for admission are inadmissible. *N.Y. Yankees P'ship v. IET Prods. & Servs., Inc.*, 114 USPQ2d 1497, 1501 n.11 (TTAB 2015) (Board considered only opposer's admissions, not denials, in response to applicant's requests for admission); *Life Zone Inc. v. Middleman Grp., Inc.*, 87 USPQ2d 1953, 1957 (TTAB 2008) (denials to requests for admission inadmissible).

¹⁶ Exhibits 56-80 (8 TTABVUE).

¹⁷ Exhibits 81-124 (9 TTABVUE).

- Opposer’s Fourth Notice of Reliance on a document produced by Applicant during discovery, and a certain admission by Applicant to a certain request in Opposer’s First Set of Requests for Admission;¹⁸
- Opposer’s Fifth Notice of Reliance on printouts from Applicant’s Facebook page;¹⁹ and
- Trial Testimony of Anthony Galvan, Opposer’s Vice President of Brand & Creative, and related exhibits (“Galvan Decl.”).²⁰

Applicant introduced the following testimony and evidence:

- Trial Testimony of Lashion Robinson, the Applicant herein and the owner and Chief Executive Officer of Hudl Inc., and related exhibit;²¹
- Applicant’s Notice of Reliance on the decision in the Prior Proceedings, i.e., this Board’s decision in *Agile Sports Technologies, Inc. v. Hudl Brewing Company LLC*, dated August 20, 2021 (Opposition Nos. 91247770, 91248316 and 91248342) (consolidated) (nonprecedential), wherein the oppositions were dismissed;²²
- Applicant’s Notice of Reliance on Opposer’s responses to select discovery requests;²³

¹⁸ Exhibits 125-26. The public version is at 10 TTABVUE, and the confidential version is at 11 TTABVUE. Exhibit 125 is a document produced by Applicant during discovery that is not self-authenticating. Documents obtained under Fed. R. Civ. P. 34 as produced documents may not be made of record by notice of reliance alone unless they are self-authenticating. Trademark Rule 2.120(k)(3)(ii), 37 C.F.R. § 2.120(k)(3)(ii). See e.g., *Schiedmayer Celesta GmbH v. Piano Factory Grp., Inc.*, 2019 USPQ2d 341894, at *1 nn. 4 & 5 (TTAB 2019) (unauthenticated documents produced in response to document requests not considered), *aff’d*, 11 F.4th 1363, 2021 USPQ2d 913 (Fed. Cir. 2021). Therefore, we give it no further consideration.

¹⁹ Exhibits 127-28 (12 TTABVUE).

²⁰ The Galvan Decl. and Exhibits 1-33 are at 13 TTABVUE. Exhibits 34-53 are at 14 TTABVUE.

²¹ 20 TTABVUE.

²² 21 TTABVUE.

²³ 22 TTABVUE. Opposer’s responses to some of Applicant’s requests for admission consist of both admissions, partial admissions and denials. We consider only Applicant’s admissions, as denials to requests for admission are inadmissible. *N.Y. Yankees P’ship*, 114 USPQ2d at 1501 n.11 (Board considered only opposer’s admissions, not denials, in response to applicant’s

- Applicant’s Notice of Reliance on third-party trademark registrations for HUDDLE and HUDDLE-inclusive marks, and a pending application to register a HUDDLE mark;²⁴ and
- Applicant’s Notice of Reliance on printouts of third-party websites, and a dictionary definition of the term “huddle.”²⁵

Opposer introduced the following rebuttal evidence:

- Supplemental Testimony Declaration of Anthony Galvan (“Galvan Reb. Decl.”) and related exhibits.²⁶

III. Background

A. Opposer’s Business and Mark

Opposer was founded in 2006.²⁷ It originally did business under the mark HUDDLE, but in mid-2008 switched to HUDL.²⁸ Since at least July 1, 2008, Opposer has done business under the HUDL name and has, since that time, continuously used the HUDL mark with all its goods and services.²⁹

Opposer claims that it has “revolutionized the way coaches and athletes prepare for and stay ahead of the competition.”³⁰ Broadly speaking, Opposer offers software

requests for admission); *Life Zone*, 87 USPQ2d at 1957 (denials to requests for admission inadmissible).

²⁴ 23, 24 TTABVUE.

²⁵ 25 TTABVUE.

²⁶ 26 TTABVUE.

²⁷ Galvan Decl., para. 8 (13 TTABVUE 4).

²⁸ Decision in the Prior Proceedings, p. 13 (21 TTABVUE 18).

²⁹ Galvan Decl., para. 10 (13 TTABVUE 5).

³⁰ *Id.* at para. 7 (13 TTABVUE 4).

products and services that are built around digital video playback and editing.³¹ Opposer's HUDL software is intended to help teams and athletes at all levels, including club and youth teams, high school teams, collegiate teams and professionals.³² Opposer's HUDL software provides players, teams and their coaches with an online mobile platform for viewing, editing and sharing videos.³³ Teams can upload game video to Opposer's servers, where it is available to anyone with viewing permission, such as coaches, training staff, players, scouts and recruiters.³⁴ Coaches and staff can, for example, flag sections of video, and insert notes or audio commentary for players to review.³⁵ They can also use clips to create digital playbooks for their teams.³⁶ Athletes can use the software to review plays, send clips to coaches and other players, and can capture, edit and share game video with other team members or coaching staff.³⁷

Below are a few screen shots of Opposer's website that illustrate some of its HUDL software features:

³¹ *Id.* at para. 11 (13 TTABVUE 5).

³² *Id.* at para. 25 (13 TTABVUE 9).

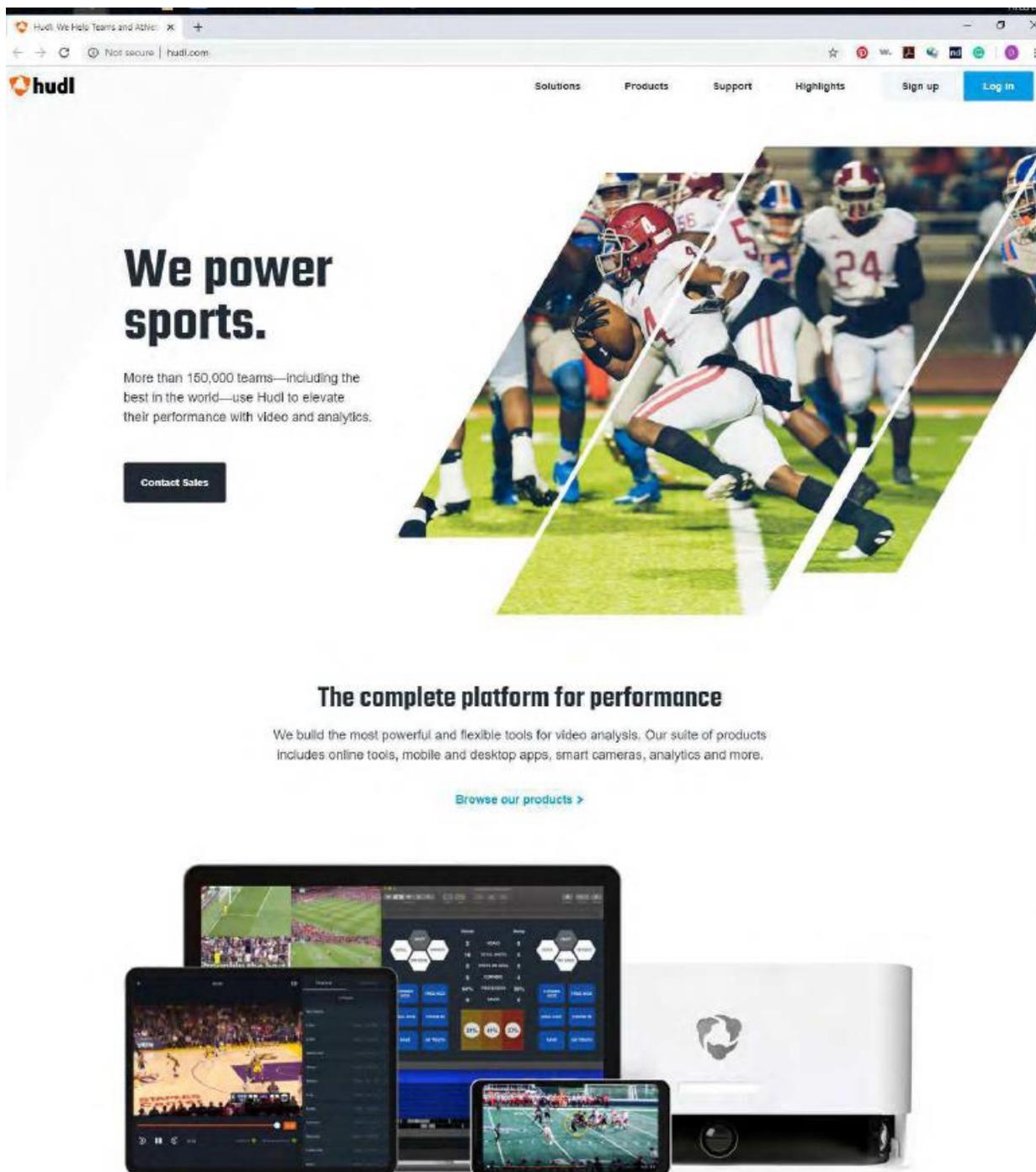
³³ *Id.* at para. 11 (13 TTABVUE 5).

³⁴ *Id.* (13 TTABVUE 5).

³⁵ *Id.* (13 TTABVUE 5).

³⁶ *Id.* (13 TTABVUE 5).

³⁷ *Id.* (13 TTABVUE 5).



³⁸ *Id.* at para. 22 and Exhibit 1 (13 TTABVUE 8, 31).



RECORD AND UPLOAD

Stick with your favorite device.

There's no need for expensive equipment. Record games, practice and training sessions with your iPhone, iPad or hard drive camera. You can even connect to Wi-Fi to upload video as it records and study within minutes.

01:64:10



uploading...



REVIEW

Find key moments fast.

Use playlists to quickly jump to the exact moments you want to study. Create a presentation for team review or pull together clips to illustrate what a player needs to improve.

TEACH

Start conversations.

Your players can't correct what they can't see. Give them the tools to review their own performance with your comments and drawings for more personalized feedback.

[Make video central to your review >](#)



39

³⁹ *Id.* at para. 22 and Exhibit 1 (13 TTABVUE 8, 34).



SHARE

Access video anywhere.

Full games, playlists and single clips can be shared with the whole team for review from any computer or mobile device.



HIGHLIGHT

Showcase your team.

Create custom highlights to share your team's success with family, friends and recruiters. Team information like schedule, roster and results can also be updated throughout the season.

[Engage fans with a team profile >](#)

⁴⁰ *Id.* at para. 22 and Exhibit 1 (13 TTABVUE 8, 35).

Additionally, Opposer's software allows teams, coaches and athletes to create, edit and share HUDL highlight reels that are complete with soundtracks.⁴¹ Players can share these videos or reels on their customizable HUDL public profile page, or they can be shared by coaches and teams on their HUDL team public profile page.⁴² They can also be shared via Facebook, Twitter, and other social media platforms, as well as by posting or sending a link.⁴³ The HUDL public profile pages, together with the HUDL videos, allow players and teams to promote themselves, build a fan base, and engage with other athletes, recruiters and sports fans across the country.⁴⁴ These profile pages can also be customized with player and team statistics, scores, and other information, and it allows these players, coaches and teams to follow other players, coaches and teams and view the videos other create and post.⁴⁵

Opposer's HUDL platform also provides a hub that allows family, friends and other sports fans to interact with players, teams and coaches.⁴⁶ For example, sports fans can (1) follow their favorite player or team, (2) search for and view the profiles of their favorite athlete, team or school, (3) search and view HUDL videos showcasing their favorite athlete, team or school, and (4) search and view featured and trending highlight videos.⁴⁷

⁴¹ *Id.* at para. 12 (13 TTABVUE 5).

⁴² *Id.* (13 TTABVUE 5).

⁴³ *Id.* (13 TTABVUE 5).

⁴⁴ *Id.* (13 TTABVUE 5-6).

⁴⁵ *Id.* at para. 17 (13 TTABVUE 7).

⁴⁶ *Id.* at para. 18 (13 TTABVUE 7).

⁴⁷ *Id.* (13 TTABVUE 7).

Additionally, Opposer itself produces a significant amount of content, including videos that contain highlights for various sports, top plays and other content. Specifically, Opposer has a media business unit, which includes HUDL Studios, that is explicitly charged with the creation of video and other content, all bearing the HUDL mark.⁴⁸ These Opposer-produced videos are featured on Opposer's webpage, on various profile pages managed by Opposer (for example, pages dedicated to football highlights, volleyball highlights, Top 5 plays, etc.), and on its YouTube channel.⁴⁹ Like other video clips discussed earlier, Opposer-produced HUDL videos can easily be shared by anyone via Facebook, Twitter or via a copied link, for example.⁵⁰

One feature of Opposer's HUDL software is the ability of users to add music to the videos.⁵¹ To this end, Opposer has obtained licenses to "an array of musical works for this very purpose."⁵² The ability to add music to videos has long been a feature of Opposer's software goods and services,⁵³ and Mr. Galvan testified about the steps a user takes to add music to a highlight reel, and supported his testimony with corroborating documentary evidence.⁵⁴

⁴⁸ *Id.* at para. 19 (13 TTABVUE 7-8).

⁴⁹ *Id.* (13 TTABVUE 7-8).

⁵⁰ *Id.* at para. 20 (13 TTABVUE 8).

⁵¹ *Id.* at para. 34 (13 TTABVUE 11).

⁵² *Id.* (13 TTABVUE 11).

⁵³ *Id.* (13 TTABVUE 11).

⁵⁴ *Id.* at para. 46-47 and Exhibit 6 (13 TTABVUE 14, 102-04).

Opposer offers a number of add-ons that build upon its HUDL software.⁵⁵ Teams that subscribe to the HUDL ASSIST service are able to upload game video – such as their own game video or an opponent’s – to Opposer’s team of professional analysts, who then break down the game and tag team statistics on both sides of the ball and, within less than 24 hours, the tagged game and report are ready for the team’s review.⁵⁶ Another add-on, HUDL SIDELINE, is a wireless in-game replay solution that allows coaches to make immediate in-game adjustments from the sideline by watching previous plays on an iPad or iPhone.⁵⁷

Opposer’s customer base has grown since its HUDL software was first launched. In 2010, Opposer served about 2,000 teams. By 2015, that number increased to more than 100,000. By late 2019, there were more than 180,000 active teams worldwide, the vast majority of which were based in the United States.⁵⁸

The number of registered users has similarly increased. By the end of 2017, Opposer had more than 5.8 million unique registered users of its HUDL software.⁵⁹ By mid-2019, that number had grown to at least 6 million unique registered users, the vast majority of which are located in the United States.⁶⁰ Opposer claims that “these numbers are just the tip of the iceberg, as they do not include the millions of

⁵⁵ *Id.* at para. 14 (13 TTABVUE 6).

⁵⁶ *Id.* (13 TTABVUE 6).

⁵⁷ *Id.* (13 TTABVUE 6).

⁵⁸ *Id.* at para. 23 (13 TTABVUE 8-9).

⁵⁹ *Id.* at para. 24 (13 TTABVUE 9).

⁶⁰ *Id.* at para. 24 (13 TTABVUE 9).

sports fans who view team and athlete profile pages and the [HUDL] videos posted on [Opposer's] website[.]”⁶¹

Opposer has enjoyed success at each level of play. At the professional level in the United States, by early 2019, Opposer's HUDL software and platform were being used by eleven National Football League (NFL) teams, all but one of the thirty National Basketball Association (NBA) teams, six National Hockey League (NHL) teams, and all of the United States National Soccer Teams.⁶²

Mr. Galvan testified that “[Opposer's] greatest success, however, may be at the collegiate and high school levels.”⁶³ Although Mr. Galvan does not elaborate on Opposer's use at the collegiate level, Mr. Galvan testified that he estimated that by the start of 2019, ninety-nine percent (99%) of all high schools in the United States were using HUDL software across more than 35 sports, including baseball, basketball, cross country, football, golf, ice hockey, and tennis.⁶⁴ Mr. Galvan testified that “[t]his translates to more than 102,000 high school teams, 405,000 high coaches, and 1.8 million high school athletes in the United States using its HUDL software.”⁶⁵

Opposer claims that its HUDL website provides a hub for videos that connects “millions of athletes and fans.”⁶⁶ Opposer claims that it is “the largest community in

⁶¹ *Id.* (13 TTABVUE 9).

⁶² *Id.* at para. 26 (13 TTABVUE 9).

⁶³ *Id.* at para. 27 (13 TTABVUE 9).

⁶⁴ *Id.* at paras. 28-29 (13 TTABVUE 9-10).

⁶⁵ *Id.* at para. 28 (13 TTABVUE 9-10).

⁶⁶ *Id.* at para. 36 (13 TTABVUE 11).

high school sports.”⁶⁷ “This community includes ... 99% of high schools, approximately 6 million registered users, approximately 150,000 teams, some 5 million app downloads, more than 35 sports ... and [that] approximately 75 million unique fans [located in the United States] have used [Opposer’s] online network to view videos and to connect with teams and players.”⁶⁸

Mr. Galvan testified that not only is the HUDL mark know by the millions of coaches and athletes that have HUDL user accounts and use the HUDL software, but “it is also know by some 80 million sports fans who view the highlight reels and videos produced using the software for entertainment purposes through [Opposer’s] hub.”⁶⁹ According to Mr. Galvan, “[e]ven this, however, vastly underestimates the audience for the HUDL highlight reels and videos because these videos (which, as noted above, include the HUDL mark in the upper right-hand corner) are routinely posted directly to other social media sites and platforms by coaches, athletes, fans, and others, including Facebook and Twitter.”⁷⁰

Mr. Galvan further testified that by early 2019, there had already been more than 1 billion views of video highlights posted on Opposer’s website.⁷¹

Opposer has been the subject of much publicity. It has been featured in The Philadelphia Inquirer, The Dallas Morning News (in both an original article and a

⁶⁷ *Id.* (13 TTABVUE 11).

⁶⁸ *Id.* (13 TTABVUE 11-12).

⁶⁹ *Id.* at para. 41 (13 TTABVUE 13).

⁷⁰ *Id.* (13 TTABVUE 13).

⁷¹ *Id.* at para. 43 (13 TTABVUE 13).

republished article), The Boston Globe, Techweek, CBS This Morning, and The NY Times.⁷²

As for awards, each year from 2016 through 2019, CIORReview named Opposer to its list of the “20 Most Promising Sports Technology Solutions Providers.”⁷³ In 2016, Fast Company named Opposer as one of the World’s 50 Most Innovative Companies of 2016.⁷⁴

Opposer markets its HUDL software through its website at hudl.com, through multiple social media sites, through *Hudl*, *The Magazine*, through unspecified traditional print and online advertising, through its sales representatives, and by participating in cross-promotional events, such as the Nike Coach of the Year Clinic.⁷⁵

Opposer has engaged in a number of strategic partnerships, including two with the NFL (1) to extend the NFL’s Way to Play award (which recognizes players who are making outstanding plays with the correct fundamental skills) to the high school level, and (2) to provide NFL Game Pass subscriptions to varsity high school football programs.⁷⁶ Opposer has also partnered with Nike to create the HUDL Combine app, which allows athletes to test their own athleticism using only an iPhone.⁷⁷

⁷² *Id.* at paras. 58-70 and Exhibits 20-31 (13 TTABVUE 17-19, 199-344).

⁷³ *Id.* at para. 63 and Exhibit 24 (13 TTABVUE 18, 231-33).

⁷⁴ *Id.* at para. 65 and Exhibit 26 (13 TTABVUE 18-19, 239-46).

⁷⁵ *Id.* at paras. 73-82 (13 TTABVUE 20-22).

⁷⁶ *Id.* at para. 86 (13 TTABVUE 23).

⁷⁷ *Id.* at para. 87 (13 TTABVUE 23).

B. Applicant's Business and Mark

Lashion Robinson, Applicant, is the owner and Chief Executive Officer of Hudl Inc.⁷⁸ Mr. Robinson is a music enthusiast who seeks to create a community for independent music creators.⁷⁹ In 2019, Mr. Robinson began developing a platform accessible through a website and via a mobile application that would enable independent artists to showcase their talent and generate a fan base.⁸⁰ Applicant's resulting platform allows artists to create a unique profile page, which the artist can then populate with original music and biographical information, and then the artist can use Applicant's platform to distribute and share their music.⁸¹ Relatedly, Applicant's platform allows each music enthusiast or fan to create an account, search for and locate music, and share comments about the music on the platform, which comments are visible to other platform users.⁸²

Although Applicant has not filed any proof of use of his HUDL mark with any of the goods or services identified in his involved application, Mr. Robinson testified that his platform (shown below) is accessible online:

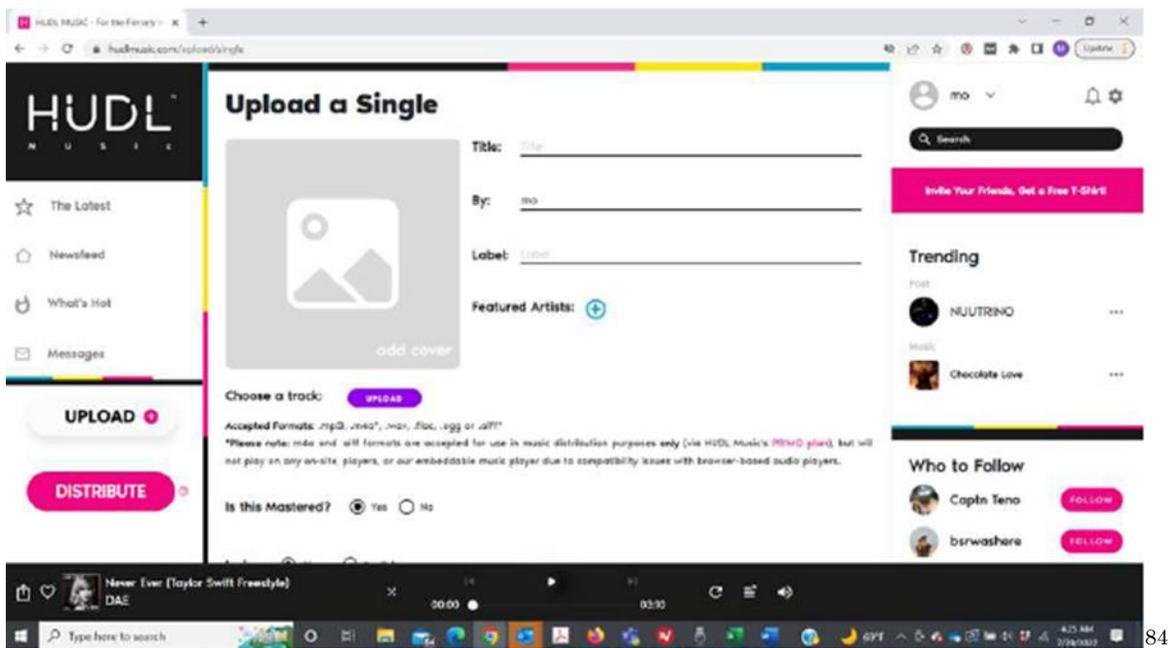
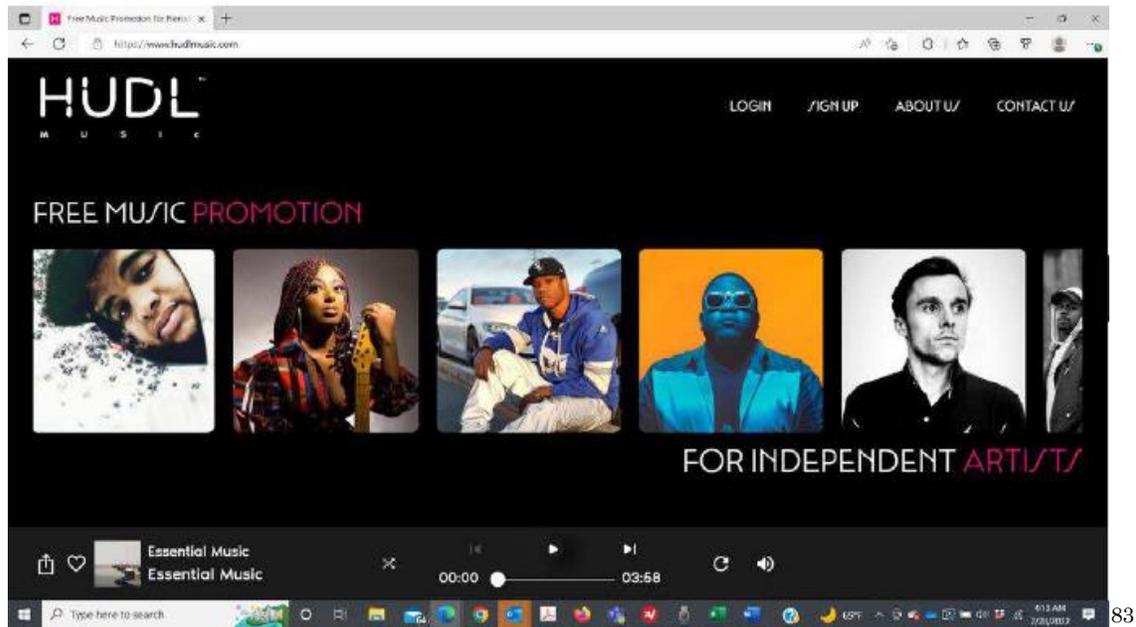
⁷⁸ Robinson Decl., para. 2 (20 TTABVUE 2).

⁷⁹ *Id.* at para. 3 (20 TTABVUE 2).

⁸⁰ *Id.* (20 TTABVUE 2).

⁸¹ *Id.* at para. 4 (20 TTABVUE 3).

⁸² *Id.* (20 TTABVUE 3).



To the extent that Mr. Robinson testified that “[t]he [p]latform is marketed under the name HUDL MUSIC,” that the platform is “not marketed under the name HUDL

⁸³ *Id.* at para. 7 and Exhibit A (20 TTABVUE 3, 10).

⁸⁴ *Id.* (20 TTABVUE 3, 16).

as a stand-alone term,”⁸⁵ and that he selected HUDL “as a prefix,”⁸⁶ we disregard this testimony. It is well-established that we consider the mark in the involved application, not as used in the marketplace. *In re Aquitaine Wine USA, LLC*, 126 USPQ2d 1181, 1186 (TTAB 2018) (“[W]e do not consider how Applicant and Registrant actually use their marks in the marketplace, but rather how they appear in the registration and the application. We must compare the marks as they appear in the drawings, and not on any labels that may have additional wording or information.”).

Mr. Robinson testified that he initially considered using the mark HUDDLE to highlight the supportive community that the platform is meant to create; however, this term was considered “too reminiscent of sports.”⁸⁷ Therefore, he selected the term HUDL, which keeps the spirit of HUDDLE but distances his platform from sports.⁸⁸ When he made this decision, he was unaware of Opposer, its software products and services, and “simply had never heard of them.”⁸⁹ Mr. Robinson further testified that his platform has “no relationship whatsoever to sports,” and he is unaware of any instances of any confusion of any kind with Opposer, despite the fact that his platform serves “many thousands” of users.⁹⁰

⁸⁵ *Id.* at paras. 7-8 (20 TTABVUE 3).

⁸⁶ *Id.* at para. 10 (20 TTABVUE 4).

⁸⁷ *Id.* at para. 10 (20 TTABVUE 4).

⁸⁸ *Id.* (20 TTABVUE 4).

⁸⁹ *Id.* (20 TTABVUE 4).

⁹⁰ *Id.* at paras. 11, 12 (20 TTABVUE 4).

IV. Entitlement to a Statutory Cause of Action

Entitlement to a statutory cause of action, formerly referred to as “standing” by the Federal Circuit and the Board, is an element of the plaintiff’s case in every inter partes proceeding. *See Corcamore, LLC v. SFM, LLC*, 978 F.3d 1298, 2020 USPQ2d 11277 (Fed. Cir. 2020), *cert. denied*, 141 S. Ct. 2671 (2021); *Australian Therapeutic Supplies Pty. Ltd. v. Naked TM, LLC*, 965 F.3d 1370, 2020 USPQ2d 10837 (Fed. Cir. 2020). To establish entitlement to a statutory cause of action, a plaintiff must demonstrate: (i) an interest falling within the zone of interests protected by the statute, and (ii) a reasonable belief in damage proximately caused by the registration of the mark. *Meenaxi Enter., Inc. v. Coca-Cola Co.*, 2022 USPQ2d 602, at *2 (Fed. Cir. 2022) (citing *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 129, 132 (2014)); *Corcamore*, 2020 USPQ2d 11277, at *4.

“[A] party that demonstrates a real interest in [oppos]ing a trademark under [Trademark Act Section 13, 15 U.S.C.] § 106[3] has demonstrated an interest falling within the zone of interests protected by [the Trademark Act]. . . . Similarly, a party that demonstrates a reasonable belief of damage by the registration of a trademark demonstrates proximate causation within the context of § 106[3].” *Made in Nature, LLC v. Pharmavite LLC*, 2022 USPQ2d 557, at *17 (TTAB 2022) (quoting *Corcamore*, 2020 USPQ2d 11277, at *7).

Inasmuch as Opposer has made its pleaded registrations of record,⁹¹ it has established a direct commercial interest in the proceeding as plaintiff. Moreover, Opposer has pleaded a plausible likelihood of confusion claim, which establishes the necessary reasonable belief in damage. *See Australian Therapeutic Supplies*, 2020 USPQ2d 10837, at *3; *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1844 (Fed. Cir. 2000) (pleaded registrations “suffice to establish ... direct commercial interest”; a belief in likely damage can be shown by establishing a direct commercial interest); *Barbara’s Bakery, Inc. v. Landesman*, 82 USPQ2d 1283, 1285 (TTAB 2007) (opposer’s entitlement to opposition established by pleaded registration being of record and non-frivolous likelihood of confusion claim). In sum, we find that Opposer has established its entitlement to bring a statutory cause of action. Applicant does not dispute Opposer’s entitlement to bring a statutory cause of action, nor even address the issue in its brief.

V. Possible Applicability of Issue Preclusion

In 2019, in the Prior Proceedings mentioned earlier, Opposer opposed the registration of the mark HUDL BREWING COMPANY, which was the subject of three applications, all in the name of Hudl Brewing Company LLC. The decision dismissing the Prior Proceedings was made of record by Applicant under a notice of reliance.⁹² Applicant submits that the testimony by Opposer in the Prior Proceedings

⁹¹ Exhibit A to the Notice of Opposition (1 TTABVUE 13-72). Specifically, the TSDR printout of the ’399 registration, which becomes the focus of the remainder of the discussion, appears at 1 TTABVUE 59-63.

⁹² Applicant’s notice of reliance (21 TTABVUE).

is substantially identical to the testimony presented in the present matter and that, as a result, “at least some of the issues presented by Opposer in this case (such as, for example, its argument that the HUDL trademark is strong) should be precluded under the issue preclusion doctrine.”⁹³ Opposer argues that issue preclusion does not apply because it was not properly raised by Applicant as an affirmative defense and was not tried by implied consent.⁹⁴ Opposer also submits that Applicant is unable to dispute Opposer’s evidence on the issue of strength of Opposer’s mark, in part, because Applicant chose not to cross-examine Mr. Galvan, Opposer’s Vice President of Brand & Creative; as a result, Applicant is left to attempt to diminish the strength of Opposer’s mark by selectively quoting from a decision that issued in a different opposition proceeding.⁹⁵ Moreover, Opposer continues, even if issue preclusion were to apply, much of the decision in the Prior Proceedings on the issue of strength of Opposer’s mark is favorable to Opposer and ultimately the Board held that the fifth *DuPont* factor supported a finding in favor of a likelihood of confusion.⁹⁶

We find that issue preclusion does not apply because it is an affirmative defense that must be pled. Where, as here, it was not pled in Applicant’s answer, but rather raised for the first time in Applicant’s brief,⁹⁷ and immediately objected to by

⁹³ Applicant’s brief, pp. 8-9 (28 TTABVUE 14-15).

⁹⁴ Opposer’s reply brief, p. 13 (29 TTABVUE 18).

⁹⁵ *Id.* (29 TTABVUE 18).

⁹⁶ *Id.* at pp. 14-15 (29 TTABVUE 19-20).

⁹⁷ Applicant’s brief, p. 8 (28 TTABVUE 14).

Opposer,⁹⁸ the defense has been waived. *See* TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE § 311.02(b)(2) (addressing specific affirmative defenses, including issue preclusion) and cases cited therein.

Moreover, even if it were properly raised by Applicant, issue preclusion does not apply here, where the parties to the present proceeding are different from the parties to the Prior Proceedings. *B.V.D. Licensing Corp. v. Rodriguez*, 83 USPQ2d 1500, 1504 (TTAB 2007) (issue preclusion does not apply where parties are not the same).

VI. Priority and Likelihood of Confusion

To prevail on a likelihood of confusion claim brought under Trademark Act Section 2(d), a party must first prove that it owns “a mark registered in the Patent and Trademark Office or a mark or trade name previously used in the United States by another and not abandoned, as to be likely, when used on or in connection with the goods of the applicant, to cause confusion, or to cause mistake, or to deceive.” 15 U.S.C. § 1052(d).

A. Priority

Because Opposer’s pleaded registrations are of record⁹⁹ and because Applicant did not counterclaim to cancel them, priority is not at issue with respect to the registered marks and the goods and services identified therein. *Nkanginieme v. Appleton*, 2023 USPQ2d 277, at *4 (TTAB 2023); *Made in Nature*, 2022 USPQ2d 557, at *19 (“In a likelihood of confusion proceeding where the opposer relies on registrations, the

⁹⁸ Opposer’s reply brief, p. 14 (29 TTABVUE 19).

⁹⁹ Exhibit A to the Notice of Opposition (1 TTABVUE 13-72).

applicant can claim priority only if it files a counterclaim or separately petitions to cancel the opposer's registrations[.]"). Moreover, Applicant admits in his Answer that "Opposer's registrations predate Applicant's commercial use of the term HUDL in interstate commerce."¹⁰⁰

B. Likelihood of Confusion

Our determination under Section 2(d) of the Trademark Act is based on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the likelihood of confusion. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (setting forth factors to be considered, referred to as "*DuPont* factors"); *see also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). "Whether a likelihood of confusion exists between an applicant's mark and a previously registered mark is determined on a case-by-case basis, aided by application of the thirteen *DuPont* factors." *Omaha Steaks Int'l v. Greater Omaha Packing Co.*, 908 F.3d 1315, 128 USPQ2d 1686, 1689 (Fed. Cir. 2018). Each *DuPont* factor for which there is evidence and argument must be considered. *In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162 (Fed. Cir. 2019). "Not all *DuPont* factors are relevant in each case, and the weight afforded to each factor depends on the circumstances. Any single factor may control a

¹⁰⁰ Answer, para. 11 (4 TTABVUE 4). Opposer's registrations need not have issued prior to Applicant's date of first actual or constructive use of its mark, and Opposer's registered marks need not have been used prior to those dates, because Section 2(d) permits opposition based simply on "a mark registered in the Patent and Trademark Office." 15 U.S.C. § 1052(d). *See Lincoln Logs Ltd. v. Lincoln Pre-Cut Log Homes, Inc.*, 971 F.2d 732, 23 USPQ2d 1701, 1704 (Fed. Cir. 1992).

particular case.” *Stratus Networks, Inc. v. UBTA-UBET Commc’ns Inc.*, 955 F.3d 994, 2020 USPQ2d 10341, at *3 (Fed. Cir. 2020) (citation omitted).

For the sake of economy, we focus our discussion on Opposer’s HUDL standard character mark of the ’399 registration, which is registered for, *inter alia*, “providing access to information, audio, and video via websites.” If we find a likelihood of confusion as to the HUDL standard character mark and the services identified in it, “we need not find it as to Opposer’s other registered marks; conversely, if we do not find a likelihood of confusion as to Opposer’s [HUDL] mark for [those services], we would not find it as to Opposer’s other registered marks for the goods [and services] identified therein.” *New Era Cap Co. v. Pro Era, LLC*, 2020 USPQ2d 10596, at *9-10 (TTAB 2020).

“Two key *DuPont* factors in every Section 2(d) case are the first two factors regarding the similarity or dissimilarity of the marks and the goods or services, because the ‘fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.’” *In re Embiid*, 2021 USPQ2d 577, at *10 (TTAB 2021) (quoting *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976)). We discuss these two factors and others below.

1. Strength or Weakness of Opposer’s HUDL Mark

To determine a mark’s strength, we consider its inherent strength, based on the nature of the mark itself, and its commercial strength, based on its recognition in the marketplace. *New Era*, USPQ2d 10596, at *10; *Bell’s Brewery, Inc. v. Innovation Brewing*, 125 USPQ2d 1340, 1345 (TTAB 2017); *Top Tobacco, L.P. v. N. Atl.*

Operating Co., Inc., 101 USPQ2d 1163, 1171-72 (TTAB 2011) (the strength of a mark is determined by assessing its inherent strength and its commercial strength); *Tea Bd. of India v. Republic of Tea Inc.*, 80 USPQ2d 1881, 1899 (TTAB 2006) (market strength is the extent to which the relevant public recognizes a mark as denoting a single source).

Opposer argues that its HUDL mark is a strong mark for purposes of a likelihood of confusion analysis, deserving of a “wide latitude of legal protection.”¹⁰¹ With this in mind, we address the strength of Opposer’s mark considering the evidence of record before us.

a. Inherent strength

Opposer’s mark issued on the Principal Register without a showing of acquired distinctiveness under Section 2(f) of the Trademark Act, 15 U.S.C. § 1052(f). Therefore, we assume that it is inherently distinctive and at least suggestive. *In re Fiesta Palms LLC*, 85 USPQ2d 1360, 1363 (TTAB 2007) (when mark is registered on the Principal Register, “we must assume that it is at least suggestive”). Nonetheless, we may find that a presumptively distinctive registered mark “is nevertheless weak as a source indicator” in the course of a *DuPont* analysis. *In re Fat Boys Water Sports LLC*, 118 USPQ2d 1511, 1517-18 (TTAB 2016).

Applicant argues that Opposer’s mark is “weak” and to support his position, he made of record “dozens” of trademark registrations for HUDL and HUDDLE marks, and formatives thereof, for goods and services that he argues are “highly related to

¹⁰¹ Opposer’s brief, p. 37 (27 TTABVUE 42) (quotation omitted).

Opposer's goods and services."¹⁰² However, Applicant does not describe any of the registrations individually, or attempt to explain how the goods or services identified in them are related to the services identified in Opposer's '399 registration. Moreover, as discussed briefly earlier, eight of the registrations proffered by Applicant are canceled and have no probative value.¹⁰³ *Kemi Organics*, 126 USPQ2d at 1606. Similarly, Applicant's evidence of a pending application to register a HUDDLE mark has no probative value.¹⁰⁴ *Nike*, 85 USPQ2d at 1193 n.8.

Of the remaining twenty-five "live" registrations, only one mark is a HUDL-formative mark: MYHUDLHEALTH, which is registered for use with software in the field of healthcare.¹⁰⁵ Given that Applicant cites no evidence—nor even makes any argument—that this software is related to Opposer's "providing access to information, audio, and video via websites," we find that the services are unrelated, and that, as a result, this mark has no probative value. *See, e.g., Omaha Steaks*, 128 USPQ2d at 1693 (error to rely on third-party evidence of similar marks for dissimilar goods, as Board must focus "on goods shown to be similar"); *In re i.am.symbolic*, 866 F.3d 1315, 123 USPQ2d 1744, 1751 (Fed. Cir. 2017) (disregarding third-party registrations for goods where the proffering party "has neither introduced evidence, nor provided adequate explanation to support a determination that the existence of I AM marks

¹⁰² Applicant's brief, pp. 25-26 (28 TTABVUE 31-32) citing to Applicant's Notices of Reliance (23, 24 TTABVUE).

¹⁰³ The cancelled registrations include Exhibits 19 and 28-31 (23 TTABVUE 105-09, 155-80) and Exhibits 33-35 (24 TTABVUE 11-28).

¹⁰⁴ Exhibit 39 (24 TTABVUE 47-49).

¹⁰⁵ Exhibit 20 (23 TTABVUE 110-15).

for goods in other classes ... support a finding that registrants' marks are weak with respect to the goods identified in their registrations”).

The remaining registrations feature HUDDLE or HUDDLE-formative marks, but again Applicant does not argue or point to any evidence that the marks make the same commercial impression as Opposer's HUDL mark and/or that the goods or services covered by these third-party registrations are related to the services identified in Opposer's '399 registration. In fact, many of the third-party registrations cover goods and services that are clearly not related to Opposer's "providing access to information, audio, and video via websites" services. Examples include but are not limited to Exhibit 11 (HUDDLE for software for creating online workspaces); Exhibit 16 (1HUDDLE for software for human resource employee training through games for business skill development); and Exhibit 17 (TECHHUDDLE for employment agency services and various technical support services).¹⁰⁶ Accordingly, they are of no probative value. *See e.g., Omaha Steaks*, 128 USPQ2d at 1693; *In re i.am.symbolic*, 123 USPQ2d at 1751.

This leaves us with the following potentially relevant, third-party registrations for HUDDLE-formative marks that cover services that are arguably related to the services for which Opposer's HUDL mark is registered:

- HUDDLE and TOPPS HUDDLE, both for providing information on sports through mobile devices (Exhibits 7 and 10);¹⁰⁷

¹⁰⁶ Applicant's Notice of Reliance (23 TTABVUE 47-60, 85-96).

¹⁰⁷ *Id.* (23 TTABVUE 16-22, 37-46).

- HUDDLE HUB for an apparatus for recording, transmitting or reproducing sound or images (Exhibit 18);¹⁰⁸ and
- JJHUDDLE.COM for providing news, information, reviews, and commentary via electronic communication networks, the Internet, and portable and wireless communication devices in the field of sports (Exhibit 22) and providing online electronic bulletin boards for transmission of messages among users in the field of sports (Exhibit 24).¹⁰⁹

Even assuming that the services identified in the above registrations are related to the services of the '399 registration, we find that these registrations are insufficient in both quality and quantity to show that the inherently-distinctive HUDL mark is conceptually weak. These third-party registrations are not qualitatively, nor quantitatively, analogous to the evidence the Federal Circuit found probative in *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1673 n.1, 1674 (Fed. Cir. 2015) and *Jack Wolfskin Ausrüstung Fur Draussen GmbH & Co. KGAA v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 116 USPQ2d 1129 (Fed. Cir. 2015).¹¹⁰

In sum, we find Opposer's mark to be conceptually strong.

¹⁰⁸ *Id.* (23 TTABVUE 98-103).

¹⁰⁹ *Id.* (23 TTABVUE 125-29, 136-39).

¹¹⁰ In *Jack Wolfskin*, there were at least 14 third-party registrations and uses of paw print marks that showed the weakness of that design element in the opposer's mark, 116 USPQ2d at 1136 n.2, while in *Juice Generation*, there were approximately 26 third-party registrations and uses of marks containing the words "Peace" and "Love" that showed the weakness of those words in the opposer's marks. 115 USPQ2d at 1673 n.1.

b. Commercial strength

Commercial strength is the extent to which the relevant public recognizes a mark as denoting a single source. *Tea Bd. of India*, 80 USPQ2d at 1889. We examine the extent to which a mark has acquired commercial strength in the marketplace under the fifth and sixth *DuPont* factors “fame of the prior mark (sales, advertising, length of use)” and “the number and nature of similar marks in use on similar goods.” *DuPont*, 177 USPQ at 567. The fifth factor (fame) examines the extent to which the public perceives the mark as indicating a single source of origin, while the sixth factor (use by others) mitigates against a mark’s potential recognition by considering whether, because of widespread third-party use of similar marks in the marketplace, “customers have been educated to distinguish between different such marks on the bases of minute distinctions.” *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1694 (Fed. Cir. 2005); *Made in Nature*, 2022 USPQ2d 557, at *20-21 (the fifth *DuPont* factor “enables Opposer to prove that its pleaded marks are entitled to an expanded scope of protection” while the sixth *DuPont* factor “allows Applicant to contract that scope of protection”).

In the context of a likelihood of confusion analysis, the commercial strength of a mark is not a binary factor. Rather, it “varies along a spectrum from very strong to very weak.” *Joseph Phelps Vineyards, LLC v. Fairmont Holdings, LLC*, 857 F.3d 1323, 122 USPQ2d 1733, 1734 (Fed. Cir. 2017) (quotation omitted).

Turning first to the fifth *DuPont* factor, “[f]ame (for likelihood of confusion purposes) may be measured indirectly by the volume of sales and advertising

expenditures in connection with the goods [or services] sold under the mark, and other factors such as length of time of use of the mark; widespread critical assessments; notice by independent sources of the goods [or services] identified by the mark; and the general reputation of the goods.” *Made in Nature*, 2022 USPQ2d 557, at *31.

Opposer argues that its HUDL mark is commercially strong for purposes of a likelihood of confusion analysis.¹¹¹ As discussed above, Mr. Galvan testified that Opposer has continuously used its HUDL mark with all its goods and services since at least July 1, 2008.¹¹² During this time Opposer’s success and popularity has grown, as highlighted below:

- Opposer estimates that it serves more than 180,000 active teams worldwide, the vast majority of which are based in the United States.¹¹³
- At the professional level in the United States, Opposer’s goods and services are in use by six NHL teams, eleven NFL teams, twenty-nine of the thirty NBA teams, and all of the United States National Soccer Teams.¹¹⁴
- At the high school level, Opposer estimates that by the start of 2019, ninety-nine percent (99%) of all high schools in the United States were using its HUDL software goods and services and that this number “has been in the high 90s for

¹¹¹ Opposer’s brief, p. 37 (27 TTABVUE 42).

¹¹² Galvan Decl, para. 10 (13 TTABVUE 5).

¹¹³ *Id.* at para. 23 (13 TTABVUE 8-9).

¹¹⁴ *Id.* at para. 26 (13 TTABVUE 9).

several years [before 2019].”¹¹⁵ Mr. Galvan testified that “[t]his translates to more than 102,000 high school teams, 405,000 high school coaches, and 1.8 million high school athletes in the United States using [Opposer’s] HUDL software.”¹¹⁶

- By mid-2019 there were at least 6 million unique registered users of Opposer’s software, the vast majority of which are located in the United States.¹¹⁷
- Opposer estimates that its brand is “known by some 80 million sports fans who view the highlight reels and videos produced ... through [Opposer’s HUDL] hub.”¹¹⁸
- By early 2019, there had already been more than 1 billion views of video highlights posted on Opposer’s website prominently featuring the HUDL mark.¹¹⁹
- Opposer has partnered with well-known brand owners, including the owners of the GATORADE, PUMA and BUFFALO WILD WINGS brands.¹²⁰
- Opposer has engaged in a number of strategic partnerships, including one with the NFL to extend the NFL’s Way to Play award to the high school level, and one with Nike to create the HUDL Combine app,¹²¹ both described above.

¹¹⁵ *Id.* at para. 28 (13 TTABVUE 9).

¹¹⁶ *Id.* (13 TTABVUE 9-10).

¹¹⁷ *Id.* at para. 24 (13 TTABVUE 9).

¹¹⁸ *Id.* at para. 41 (13 TTABVUE 13).

¹¹⁹ *Id.* at para. 43 (13 TTABVUE 13).

¹²⁰ *Id.* at para. 37 and Exhibit 3 (13 TTABVUE 12, 85)

¹²¹ *Id.* at paras. 86-87 (13 TTABVUE 23).

Although Mr. Galvan testified that Opposer's greatest success includes the collegiate level, he did not include any details about the use of the HUDL platform at the collegiate level.¹²²

It is clear based on this record that Opposer's greatest success is at the high school level. In addition to the above-discussed evidence, Mr. Galvan testified that at the high school level, it has approximately 6 million registered users, and approximately 75 million unique fans.¹²³ Although it is not entirely clear because Mr. Galvan uses general timeframes (i.e., mid-2019) instead of exact dates, and he uses round numbers (i.e., 5.8 million and 6 million), it appears that the bulk of the registered users and unique fans broadly identified above are made up of users and fans associated with Opposer's high-school aged consumers.

As for publicity, below are excerpts from some more recent articles featuring Opposer, again primarily noting Opposer's success at the high school level:

- The Boston Globe published an article on April 12, 2020 titled, "How has the coronavirus pandemic impacted college recruiting for high school athletes?"¹²⁴ It states that "Hudl ... has become the standard for scouts and recruits [and it's] also a way for coaches to provide instruction and stay connected to their players during this period of social distancing [caused by the Covid-19 pandemic]."¹²⁵

¹²² *Id.* at para. 27 (13 TTABVUE 9).

¹²³ *Id.* at para. 36 (13 TTABVUE 11-12).

¹²⁴ *Id.* at para 70 and Exhibit 31 (13 TTABVUE 19, 340-44).

¹²⁵ Exhibit 31 (13 TTABVUE 343).

- JournalStar.com published an article dated May 23, 2020, entitled, “Hudl CEO excited by sports world beginning to reopen.”¹²⁶ It reads in part: “At a time when sports worldwide have been shut down for more than two months, Graff[, Hudl’s CEO,] said there has been a 30% increase in highlight videos watched.”¹²⁷
- Business Tribune published an article, “TFNW19: Sensors and sensibility,” dated November 24, 2019, which reads in part: “[Hudl] was focused on the elite [teams] first, then suddenly it quickly hit the mainstream. It went to 100 percent of high school football teams in just five years.”¹²⁸
- The Dallas Morning News published an article titled: “Film breakthrough: How digital advances have revolutionized the scouting game for Texas high school football coaches,” originally published on November 14, 2018 and republished on July 13, 2019.¹²⁹ According to it, “Scouts have studied the game tape for years, but recent developments, particularly through a software company called Hudl, allow coaches, teams and players to more effortlessly share, annotate and break down game tape.”¹³⁰
- The Boston Globe published an article dated September 6, 2018, titled “Technology changes how high school football coaches prepare their

¹²⁶ Galvan Decl., para. 70 and Exhibit 31 (13 TTABVUE 19, 305-09).

¹²⁷ Exhibit 31 (13 TTABVUE 308).

¹²⁸ Galvan Decl., para. 69 and Exhibit 30 (13 TTABVUE 19, 266-78) (quotation omitted).

¹²⁹ Galvan Decl., para. 60 and Exhibit 21 (13 TTABVUE 18, 206-12).

¹³⁰ Exhibit 21 (13 TTABVUE 208).

players,”¹³¹ which states, “The standard game-film tool [today] is provided by Hudl All but two of the 311 Massachusetts football programs [subscribe to Hudl].”¹³² “I was blown away [by Hudl’s software],” said St. Pierre, the school’s football coach, whose prior career includes playing for Boston College and in the NFL.¹³³

- Techweek published an article titled, “Hudl’s Sporting Revolution,” dated March 26, 2018.¹³⁴ “Simply put – Hudl is changing the way coaches and players are participating and competing.”¹³⁵ “Hudl has unleashed a lasting sporting revolution.”¹³⁶

Apart from The Boston Globe article, published on April 12, 2020, that states that “Hudl, ... has become the standard,” the remaining articles primarily describe the usefulness of Opposer’s technology and the growth of Opposer’s company, rather than the notoriety of the HUDL mark *per se*. While Opposer’s rapid growth and success is substantial, the evidence discussed above and other evidence of record (such as Opposer being named to the CIOReview’s list of “20 Most Promising Sports Technology Providers”) has little probative value in showing the strength of the HUDL mark on Opposer’s likelihood of confusion claim. *Cf. Joseph Phelps Vineyards,*

¹³¹ Galvan Decl., para. 61 and Exhibit 22 (13 TTABVUE 18, 214-20).

¹³² Exhibit 22 (13 TTABVUE 215-16).

¹³³ *Id.* (13 TTABVUE 217).

¹³⁴ Galvan Decl., para. 62 and Exhibit 23 (13 TTABVUE 18, 224-30).

¹³⁵ Exhibit 23 (13 TTABVUE 226).

¹³⁶ *Id.* (13 TTABVUE 230).

122 USPQ2d at 1734-35 (strength of the opposer’s mark shown in part by articles establishing “extensive recognition and accolade for INSIGNIA brand wine”).

Turning to Opposer’s marketing efforts, Opposer markets its HUDL services in numerous ways, including through its website and social media.¹³⁷ Opposer has multiple Twitter accounts (both general accounts and accounts that are specific to a sport, for example), and multiple Facebook accounts, one of which has been maintained by Opposer since 2009 and has more than half a million followers.¹³⁸ One of Opposer’s Instagram accounts has 370k followers.¹³⁹ Additionally, Opposer’s YouTube channel has more than 9 million views.¹⁴⁰

As for print media, Opposer promotes its HUDL goods and services in its “*Hudl, The Magazine*,” which Opposer launched in 2018,¹⁴¹ but Mr. Galvan did not testify as to any other details, such as the number of customers to whom it is regularly sent. Mr. Galvan did testify that Opposer also engages in “traditional print and online advertising” but he did not provide any details.¹⁴²

Mr. Galvan testified that Opposer’s marketing budget was \$8.7M in 2019, \$7.4M in 2018, and \$6.2M in 2017, and that “[a]s [Opposer] uses its HUDL mark across all of its products and services, virtually all of its marketing efforts feature its HUDL

¹³⁷ Galvan Decl., paras. 24, 73-74 (13 TTABVUE 9, 20).

¹³⁸ *Id.* at paras. 75-77 (13 TTABVUE 20-21)

¹³⁹ *Id.* at para. 78 (13 TTABVUE 21).

¹⁴⁰ *Id.* at para. 79 (13 TTABVUE 21).

¹⁴¹ *Id.* at para. 80 (13 TTABVUE 21).

¹⁴² *Id.* (13 TTABVUE 21).

name and marks.”¹⁴³ However, Opposer does not provide any additional context for its marketing budget, such as how much is spent targeting professional athletes, collegiate athletes and high-school athletes, for example. Opposer’s evidence is also deficient because, as Opposer’s HUDL and HUDL-formative marks are registered for a number of goods and services, it is not possible to tell from the evidence of record how much of the budget was devoted specifically to which product or service, such as the services offered under the HUDL mark of the ’399 registration.

In discussing the strength of Opposer’s mark, the decision in the Prior Proceedings reads in part:

The record shows that Opposer has achieved virtually a 100% market share among high school teams, coaches, trainers, and athletes. With respect to Opposer’s high school sub-market, we find that the HUDL mark “falls on the much higher end of the commercial strength spectrum ‘from very strong to very weak.’” With respect to teams, coaches, and athletes at the professional, college, and youth levels, however, the record does not a [sic] support a similar finding, and in these sub-markets we accord the HUDL mark only “the normal scope of protection to which inherently distinctive marks are entitled.”¹⁴⁴

Based on the record in the present proceeding, and consistent with the decision in the Prior Proceeding, we find that Opposer has established that its HUDL mark falls on the much higher end of the commercial strength spectrum with respect to the high school sub-market at least through early 2020.

¹⁴³ *Id.* at para. 72 (13 TTABVUE 20).

¹⁴⁴ Decision in the Prior Proceedings, pp. 53-54 (21 TTABVUE 58-59) (citations omitted).

As noted by Applicant,¹⁴⁵ Opposer's testimony evidence summarized above is substantially similar to Opposer's testimony evidence summarized in the decision in the Prior Proceedings, which was decided in 2021. The evidence on which Opposer relies to support its assertion that its mark is strong in the present matter is dated 2016-2020, with most of Mr. Galvan's testimony relying on data only as current as 2019, raising a question as to the *current* strength of the mark. *Cf., e.g., Harry Winston, Inc. v. Bruce Winston Gem Corp.*, 111 USPQ2d 1419, 1438-40 (TTAB 2014) (finding HARRY WINSTON famous for jewelry on evidence including "sales in the billions, advertising and marketing expenditures in the millions, and editorial mentions valued in the millions over an eighty year period"). The Board generally considers evidence related to the strength of a mark up to the time of trial, which in the present case began in mid-August, 2021, a time during which we were still in the midst of the pandemic. *See, e.g., ProMark Brands Inc. v. GFA Brands, Inc.*, 114 USPQ2d 1232, 1250 (TTAB 2015). While the pandemic may have negatively impacted some of Opposer's data that it would have relied upon to show the strength of its mark, we nonetheless expect the issue to be addressed so that we may make a determination about the current strength of Opposer's mark.

Accordingly, based on the record before us, while Opposer has established that through early 2020 its mark was commercially strong in the high school sub-market, it is unclear whether Opposer has maintained the strength of its mark, and therefore,

¹⁴⁵ Applicant's brief, p. 22 (28 TTABVUE 28).

on this record, we cannot find that Opposer's mark is currently strong in the high school sub-market.

c. The Number and Nature of Similar Marks in Use on Similar Goods and Services

Turning to the sixth *DuPont* factor, evidence that the public is confronted with significant use by others of similar marks for similar services tends to indicate a lack of commercial strength. *DuPont*, 177 USPQ at 567. "Evidence of third-party use of similar marks on similar [services] is relevant to show that a mark is relatively weak and entitled to only a narrow scope of protection." *In re FabFitFun*, 127 USPQ2d 1670, 1674 (TTAB 2018) (quoting *Palm Bay*, 73 USPQ2d at 1693).

To this end, Applicant introduced printouts of various websites that use HUDL or HUDDLE marks, or formatives thereof, for what Applicant describes as "goods and services that are identical to or highly related to Opposer's goods and services," which Applicant characterizes as "considerable."¹⁴⁶ However, Applicant does not further discuss these marks, or explain how the goods and services offered by these third-parties are related to those of Opposer's. According to Applicant's notice of reliance, Exhibits 41-47, 49-53 relate to the issue of commercial strength, so we review this evidence of third-party use.

First, some of the evidence proffered by Applicant shows use of a mark outside the United States (Exhibits 41 and 53), which is not relevant here.

¹⁴⁶ Applicant's brief, p. 26 (28 TTABVUE 32). Applicant's third-party use evidence is available at 25 TTABVUE.

Second, some of the evidence shows use of a HUDL or HUDDLE formative mark, but there is no evidence that the goods or services offered under the mark are related to those offered by Opposer: Exhibit 42 (a chat app for parents); Exhibit 45 (an educational conference); Exhibit 49 (a social networking app for finding things to do and places to go); Exhibit 50 (an online video conferencing site for increasing work productivity); Exhibit 51 (a sports venue booking app); and Exhibit 52 (a photo booth rental). It is unclear what goods or services are offered under the mark shown at Exhibits 43, 44, and 47. Therefore, we find that the aforementioned evidence is not probative. *Omaha Steaks*, 128 USPQ2d at 1693-94 (“[T]he relevant *du Pont* inquiry is [t]he number and nature of similar marks in use on similar goods.”) (quotation omitted).

Only one exhibit possibly bears on the commercial weakness of Opposer’s mark: The Morning Huddle for use with articles featuring players or coaches in the NFL (Exhibit 46). However, even assuming that this mark makes a similar commercial impression and even assuming that the services offered under the marks are related, this single third-party use is not sufficient to diminish the commercial strength of Opposer’s HUDL mark. This third-party use evidence reflects a significantly more modest amount of evidence than that found convincing where a more considerable number of third-party uses were shown. *Jack Wolfskin*, 116 USPQ2d at 1136; *see also Juice Generation*, 115 USPQ2d at 1673 n.1, 1674. In sum, we find that Applicant has not successfully diminished the commercial strength of Opposer’s mark; therefore, the sixth *DuPont* factor is neutral.

d. Summary of the Strength or Weakness of Opposer's Mark.

In summary, we find that Opposer's HUDL mark is conceptually strong. We also find the evidence does not support a finding that Opposer's mark is commercially strong or weak; therefore, the HUDL mark is only entitled to the normal scope of protection to which an inherently distinctive mark is entitled.

2. Similarity or Dissimilarity of the Marks

We turn to the first *DuPont* factor, "similarity or dissimilarity of the marks." *DuPont*, 177 USPQ at 567. For this factor, we consider "the marks in their entirety as to appearance, sound, connotation and commercial impression." *In re Viterro Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012). *See also Palm Bay*, 73 USPQ2d at 1691. "The proper test is not a side-by-side comparison of the marks, but instead 'whether the marks are sufficiently similar in terms of their commercial impression' such that persons who encounter the marks would be likely to assume a connection between the parties." *Coach Servs. Inc. v. Triumph Learning, LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012) (citation omitted). The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. *See Inter IKEA Sys. B.V. v. Akea, LLC*, 110 USPQ2d 1734, 1740 (TTAB 2014).

Applicant's involved mark is HUDL in standard characters and Opposer's registered mark is also HUDL in standard characters. Thus, the marks are identical in sight and sound. Because the marks are used with related goods and services, as

discussed herein below, we find that they have the same meaning engender the same commercial impression.

Applicant in its brief “acknowledges that this [first] factor weighs in favor of Opposer, at least with respect to the five ‘HUDL’ registrations,”¹⁴⁷ as is the case here, drawing a distinction between HUDL and HUDL-formative marks, such as HUDL ASSIST.

In sum, we find that the first factor weighs heavily in favor of a finding of likelihood of confusion.

3. Similarity or Dissimilarity of the Goods and Services, and Channels of Trade

The second *DuPont* factor “considers ‘[t]he similarity or dissimilarity and nature of the goods or services as described in an application or registration,” *In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1051 (Fed. Cir. 2018), while the third *DuPont* factor considers “the similarity or dissimilarity of established, likely to continue trade channels.” *Id.* at 1052 (quoting *DuPont*, 177 USPQ at 567).

a. Similarity or Dissimilarity of the Goods and Services

The second *DuPont* factor assesses the similarity or dissimilarity of the parties’ goods and services. In comparing the goods and services, the issue to be determined is not whether the goods and services of Opposer and Applicant are likely to be confused but rather whether there is a likelihood that purchasers will be misled into

¹⁴⁷ Applicant’s brief, p. 10 (28 TTABVUE 16).

believing that they emanate from a common source. *Helene Curtis Indus. Inc. v. Suave Shoe Corp.*, 13 USPQ2d 1618, 1624 (TTAB 1989). The goods and services need not be similar or even competitive, rather, it is sufficient “if the respective [goods and services] are related in some manner and/or if the circumstances surrounding their marketing are such that they could give rise to the mistaken belief that they emanate from the same source.” *Coach Servs.*, 101 USPQ2d at 1722 (quotation omitted).

Applicant’s application identifies, *inter alia*, the following goods and services:

- (1) Downloadable music files, in Class 9;
- (2) Music production services, in Class 41; and
- (3) Online social networking services, in Class 45.

We begin with Applicant’s services of providing “online social networking services” and consider them relative to the services of “providing access to information, audio, and video via websites,” as identified in Opposer’s pleaded ’399 registration.

Mr. Robinson testified that he envisioned using the HUDL mark on an online platform that will accommodate both musical artists and music fans.¹⁴⁸ Specifically, he explained that artists will be “able to create unique profile pages, which the artist is then able to populate with original music and a bio;” the artist can then utilize the platform “to distribute and share music.”¹⁴⁹ Fans may “browse the various artists” and search the site to locate music and leave comments.¹⁵⁰

¹⁴⁸ Robinson Decl., paras. 3-4 (20 TTABVUE 2-3).

¹⁴⁹ *Id.* at para. 4 (20 TTABVUE 3).

¹⁵⁰ *Id.* (20 TTABVUE 3).

When asked in an interrogatory to identify all the goods and services with which Applicant intends to use his mark, Applicant responded that his mark is or will be used in connection with “all those goods and services which are made available through [his] website at hudlmusic.com” and that “all of Applicant’s goods and services (downloadable music files, music production, and social networking) are tied to this platform and presently accessible [through Applicant’s] website ... [and] Applicant does not currently intend to offer goods or services other than the ones currently offered by him [under his] HUDL MUSIC [mark].”¹⁵¹ We understand this to mean that all of the goods and services identified by Applicant in its involved application (i.e., downloadable music files, music production services, and social networking services) are tied to the platform created by Applicant and currently accessible through his website.

In other words, Applicant seeks to use the HUDL mark to provide access to original music (e.g. “audio files”) through his website, which is closely related to and/or overlaps with Opposer’s “providing access to ... audio ... via websites.”

Additionally, the manner in which Applicant seeks to provide downloadable music files (i.e., the goods identified in Class 9 of Applicant’s involved application) and music production services, which is broad enough to include online music production services (i.e., the services identified in Class 41 of Applicant’s involved application) necessarily entails “providing access to information and audio via a website.”

¹⁵¹ Response to Interrogatory No. 9 (7 TTABVUE 9).

In sum, we find that all of the goods and services identified in Applicant's involved application are closely related to and/or overlap with "providing access to information, audio, and video via websites" identified in Opposer's '399 registration and that, as a result, this factor weighs in favor of a finding of likelihood of confusion.

Applicant does not address Opposer's arguments that the parties' goods and services are closely related as discussed above. Rather, Applicant correctly acknowledges in its brief that all of Opposer's descriptions – with the exception of two – expressly specify a connection with sports.¹⁵² Then, ignoring these two exceptions, Applicant compares the parties' goods and services, consistently and impermissibly reading a "sports" limitation into all of Opposer's identifications and a "music-centric" limitation into all of Applicant's, and then drawing distinctions.¹⁵³ These arguments are unpersuasive.

Applicant also argues there is no "*per se* rule" relating to source confusion vis-à-vis computer hardware and software.¹⁵⁴ Applicant then generalizes the parties' identifications of goods and services, arguing that "[b]roadly speaking, both Applicant and Opposer intend to offer a platform that enables users to create content, upload content and share content," and that this software functionality is "ubiquitous" and "found everywhere."¹⁵⁵ Continuing, Applicant argues that because there is no *per se* rule of relatedness, and while the parties here offer (or intend to offer) overlapping

¹⁵² Applicant's brief, pp. 13-15 (28 TTABVUE 19-22).

¹⁵³ *Id.* (28 TTABVUE 19-22).

¹⁵⁴ *Id.* at p. 16 (28 TTABVUE 22).

¹⁵⁵ *Id.* (28 TTABVUE 22).

functionality, that is simply insufficient to find that the goods/services are related, where, as here, the industry specific focus of each parties' goods and services is different, i.e., sports versus music.¹⁵⁶

We agree that there is no *per se* rule of relatedness, nor does Opposer argue for the adoption of one. Apart from this, we are not persuaded by Applicant's arguments, which do not address the traditional goods/services similarity analysis conducted above, and which arguments are premised on the flawed assumption that would have us we read a limitation of "sports" into all of Opposer's identifications and a limitation of "music-centric" into all of Applicant's identifications.

Additionally, Applicant argues that Opposer relies on its common law use to establish relatedness of the goods and services, even though this Board denied Opposer's motion to so amend its pleading to allege common law rights.¹⁵⁷ This argument is not persuasive. While it is true that Mr. Galvan testified about the ability of a user to add a soundtrack to the user's highlight reel and Opposer's efforts to license music for this purpose, we are not relying on this evidence, for example, to support our finding as to relatedness.

In sum, we find the second *DuPont* factor weighs in favor of a finding of likelihood of confusion.

¹⁵⁶ *Id.* at p. 20 (28 TTABVUE 26).

¹⁵⁷ Applicant's brief, pp. 20-21 (28 TTABVUE 26-27).

b. The Similarity of the Channels of Trade

Under the third *DuPont* factor, we consider evidence pertaining to the similarity or dissimilarity of the trade channels in which the goods and services identified in the involved application and registration, respectively, are marketed. *Detroit Athletic Co.*, 128 USPQ2d at 1052 (quoting *DuPont*, 177 USPQ at 567). Because neither Applicant's nor Opposer's identifications include any restrictions or limitations as to trade channels, we assume that the respective goods and services are or would be marketed in all normal trade channels for such goods and services. *Packard Press, Inc. v. Hewlett-Packard Co.*, 227 F.3d 1352, 56 USPQ2d 1351, 1357 (Fed. Cir. 2000). We thus presume that, to the extent that the parties' goods and services overlap, they will be offered in overlapping trade channels to overlapping classes of consumers.

Applicant in its brief does not address this *DuPont* factor, nor did Applicant present any evidence at trial regarding it.

Thus, we find that the third *DuPont* factor weighs in favor of a finding of likelihood of confusion analysis.

4. Conditions Under Which and Buyers to Whom Sales Are Made

The fourth *DuPont* factor is the "conditions under which and buyers to whom sales are made, i.e. 'impulse' vs. careful, sophisticated purchasing." *DuPont*, 177 USPQ at 567.

Opposer argues that both its and Applicant's goods and services are targeted, in part, to unsophisticated purchasers and that while certain users of Opposer's

software services—such as coaches and team managers may be relatively sophisticated—its software services are also used by youth and high-school aged athletes, as well as approximately 75 million sports fans in the United States, who may not be sophisticated.¹⁵⁸ Similarly, the potential consumers of Applicant’s identified goods and services is broad—essentially anyone who likes music—and, therefore, includes unsophisticated consumers. Neither Opposer nor Applicant charge for browsing their sites nor is a subscription required.¹⁵⁹

Under the fourth *DuPont* factor, we must consider all potential consumers of the goods and base our decision on the least sophisticated consumer. *Stone Lion Capital Partners, L.P. v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1163 (Fed. Cir. 2014) (“the analysis must focus on the ‘least sophisticated potential purchasers’ of the goods”); *Volkswagenwerk AG v. Rose’Vear Enters., Inc.*, 592 F.2d 1180, 201 USPQ 7, 9 (CCPA 1979) (comparison of marks “must take into account the commercial impression of the marks on casual purchasers”).

We agree that the parties’ identified goods and services are of the type that would be used by ordinary consumers, including young persons who may not be sophisticated consumers. Further, the record shows that the parties’ websites are free to browse and that, for example, no subscription or account is required to access some portions of each site. Although we do not read price restrictions into the parties’ identifications, *In re Fabfitfun, Inc.*, 127 USPQ2d at 1673, the fact that the parties

¹⁵⁸ Opposer’s brief, pp. 40-41 (27 TTABVUE 45-46).

¹⁵⁹ Applicant’s Response to Interrogatory No. 20 (7 TTABVUE 13).

offer their sites for free is evidence that these types of sites are offered at a low or no price point. Consumers of low-cost products “have long been held to a lesser standard of purchasing care.” *Kimberly-Clark Corp. v. H. Douglas Enters., Ltd.*, 774 F.2d 1144, 227 USPQ 541, 542 (Fed. Cir. 1985); *Specialty Brands, Inc. v. Coffee Bean Distribs., Inc.*, 748 F.2d 669, 223 USPQ 1281, 1282 (Fed. Cir. 1984) (same); *Made in Nature*, 2022 USPQ2d 557, at *52 (recognizing that low cost items are subject to impulse buying); *Eveready Battery Co. v. Green Planet, Inc.*, 91 USPQ2d 1511, 1516 (TTAB 2009) (“Generally, purchasers of casual, low cost ordinary consumer items exercise less care in their purchasing decisions and are more likely to be confused as to the source of the goods.”).

Applicant does not address this factor in its brief.

In view of the foregoing, we find that the fourth *DuPont* factor weighs in favor of a likelihood of confusion.

5. The Extent of Potential Confusion

The twelfth *DuPont* factor concerns “[t]he extent of potential confusion, i.e. whether *de minimis* or substantial.” *DuPont*, 177 USPQ at 567. Applicant argues that “[i]f there is *any* potential for consumer confusion between Applicant’s mark and the cited registrations, it is *de minimis*[.]” and that it “cannot be presumed that a substantial number of relevant purchasers are likely to be confused by the concurrent use of [the parties’ marks].”¹⁶⁰ Applicant does not cite to any evidence of record to support its position. Rather, Applicant relies solely on attorney argument, which is

¹⁶⁰ Applicant’s brief, p. 26 (28 TTABVUE 32).

rarely, if ever, persuasive. *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1799 (Fed. Cir. 2018) (“Attorney argument is no substitute for evidence.”).

As there is no evidence regarding the twelfth factor, we find that this factor is neutral in our analysis.

6. Balancing the Factors

Opposer’s HUDL mark is conceptually strong. The evidence does not support a finding that Opposer’s mark is commercially strong or weak; therefore, the HUDL mark is only entitled to the normal scope of protection to which an inherently distinctive mark is entitled. The goods and services in the involved application are closely related to and/or overlap with those identified in Opposer’s ’399 registration. We thus presume that, to the extent that the parties’ goods and services overlap, they will be offered in overlapping trade channels. Both parties offer their goods and services for free to unsophisticated consumers, thus the fourth factor weighs in favor of a likelihood of confusion. The twelfth factor, i.e., the extent of potential confusion, i.e. whether *de minimis* or substantial, is neutral. Weighing these factors, we find that Applicant’s mark is likely to be confused with Opposer’s mark, due primarily to the fact that the marks are identical and that the parties’ goods and services are closely related and/or overlap.

VII. Decision

The opposition to registration of the mark is sustained.